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No. 82-556

IN THE

Supreme Court of the United States

October Term, 1982

THE PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

ALBERT GREENWOOD BROWN, JR.,
Defendant.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO.

BRIEF OF RESPONDENT ON THE MERITS.

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TABLE OF CONTENTS

	Page
Jurisdiction	1
Constitutional Provisions Involved	2
Statement of the Case	2
Summary of Argument	3
Argument	6
I. The Right of the Public to Attend Criminal Trials Is Not Absolute and May Be Denied in Appropriate Cases	6
II. The Denial of the Public's Right of Access to the Jury Voir Dire in This Case Was Proper Under the Three-Pronged Standard of Richmond Newspapers	7
III. The Trial Court Did Not Violate the Public's First Amendment Right of Access to Criminal Trials by Its Application of Hovey	10
IV. Prospective Jurors in a Criminal Case Have a Constitutional Right to Privacy Which the State has a Legitimate Interest in Protecting During Voir Dire	12
V. The Sealing of the Transcript Was Necessary to Preserve and Protect the Privacy Right of All the Jurors	17
Conclusion	20

TABLE OF AUTHORITIES

Cases	Page
Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450	6
Deerfield Medical Center v. City of Deerfield Beach (5th Cir. (Unit B) 1981) 661 F.2d 328	14
Gannett Co. v. De Pasquale (1979) 443 U.S. 368	1
Globe Newspaper Co. v. Superior Court (1982) ___ U.S. ___, 102 S.Ct. 2613, 73 L.Ed.2d 248	3, 6, 7, 9, 19, 21
Griswold v. Connecticut (1965) 381 U.S. 479	13, 14
Hovey v. Superior Court (1980) 28 Cal.3d 1	4, 10, 11, 16
Katz v. United States (1967) 389 U.S. 347	13, 14
Lehman v. City and County of San Francisco (1978) 80 Cal.App.3d 309	13
NAACP v. Alabama (1958) 357 U.S. 449	13, 14
Nixon v. Administrator of General Services (1977) 433 U.S. 425	13
Olmstead v. United States (1928) 277 U.S. 438	12, 13
People v. Teitelbaum (1958) 163 Cal.App.2d 184	6
People v. Williams (1981) 29 Cal.3d 392	4, 11, 18
Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555	4, 6, 7, 12, 21
Roe v. Wade (1973) 410 U.S. 113, reh. den. 410 U.S. 959	14
Ryder v. State (1897) 100 Ga. 528, 28 S.E. 246	15
Sprouce v. Commonwealth (1823) 2 Va.Cas. 375	15
Twining v. State (1964) 198 A.2d 291	15

Page

United States v. Barnes (2d Cir. 1979) 604 F.2d 121, cert. den. 446 U.S. 907 ..... 15, 17

United States v. Brooklier (9th Cir. 1982) 685 F.2d 1162 6

United States v. Bufalino (2d Cir. 1978) 576 F.2d 446, cert. den. 439 U.S. 928 15

Whalen v. Roe (1977) 429 U.S. 589 13

Constitutions

California Constitution, Art. I, Sec. 1 13

California Constitution, Art. VI, Sec. 11 2

United States Constitution, First Amendment 6, 8, 10

United States Constitution, Sixth Amendment 8, 16

United States Constitution, Ninth Amendment 2

Statute

California Penal Code Sec. 190.2(a)(17)(iii) 2

Textbooks and Treatises

California Judge's Bench Book-Civil Trials, California Center for Judicial Education and Research (1981), Sec. 4.19, p. 100 16

Comment, "The Right to Privacy of Prospective Jurors During Voir Dire, 70 Cal.L.Rev. 708 (1982) 13

Cooley on Torts (1888) p. 29 12

1 Holdsworth, W., A History of English Law, pp. 317, 319 (3rd ed. 1922) 14

Levit, Expediting Voir Dire: An Empirical Study, 44 So.Cal.L.Rev., pp. 916, 922 (1971) 14, 15

Moore, Voir Dire Examination of Jurors, I. The English Practice, 1 Geo. L. J., pp. 438, 445 (1928) 14

Page

Report of the Commission on Personal Privacy by the State of California Commission on Personal Privacy (December 1982) pp. 23, 288-290 ..... 12, 13

Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free-Press — Fair Trial" Issue, approved by Judicial Conference of the United States (September 25, 1980), 87 F.R.D. 519 (1981) 7

Warren and Brandeis, "The Right to Privacy", 4 Harvard Law Review, p. 193 (1890) 12

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ALBERT GREENWOOD BROWN, JR.,

Defendant.

BRIEF OF RESPONDENT ON THE MERITS.

Jurisdiction.

Questions have been raised as to this Court's jurisdiction in this case. Petitioner's brief appears to suggest that the case may be moot because *voir dire* is now completed and the trial is over in the underlying case. (Br. 13-15.) Since the *voir dire* transcript is still sealed from the public, Petitioner's fears seem unfounded. (*Gannett Co. v. De Pasquale* (1979) 443 U.S. 368.) Similarly, the State of California surmises the case is procedurally flawed because the

initial petition for review was filed with the State Court of Appeal although all death-penalty cases are automatically appealed directly to the Supreme Court of California pursuant to the Constitution of the State of California, Art. VI, Section 11. (Br. 10, n.3.)

However, it seems unlikely that a petition for review of the issues in this case would be governed by any automatic appeal provisions. Moreover, Petitioner did file a petition for review in the Supreme Court of California after the denial by the Court of Appeal; thus the procedural deficiency, if any, would seem to have been cured.

Constitutional Provisions Involved.

In addition to the Constitutional provisions referred to by Petitioner Newspaper, Respondent Court would add:

United States Constitution, Ninth Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Statement of the Case.

Albert Greenwood Brown, Jr., the defendant in the underlying criminal action was charged with and ultimately convicted of the rape and murder of a teenage girl (J.A. 40-45.) Because he was convicted of having committed the murder in connection with the rape, a special circumstance under California Penal Code, Section 190.2(a)(17)(iii), he was sentenced to death. His appeal from that judgment is now pending before the Supreme Court of California.

On October 19, 1981, prior to the commencement of the jury *voir dire*, the Petitioner Newspaper made a written motion for an order that the press and public be afforded access to the entire jury *voir dire*. (J.A. 46-51.) The Respondent Trial Court ruled that the general *voir dire* questioning

would be open to the public but that *voir dire* as to the death-qualifying issues and any other special areas into which trial counsel wished to inquire, would be held in private. (J.A. 1, 93.) In the end, there were approximately three days of general *voir dire* which was open to the public and nearly six weeks of *voir dire* which was conducted in private.

On December 30, 1981, after completion of the *voir dire*, the Newspaper moved the Trial Court for the release of the *voir dire* transcripts. (J.A. 52-60); the motion was denied. (J.A. 37.) On February 23, 1982, after the trial was completed, the Newspaper made an ex parte application for release of the jury *voir dire* transcripts.[1] (J.A. 39, 64-65.) This application was denied.[2]

Summary of Argument.

This Court has recognized that the public's right of access to criminal trial is not absolute and that the press and the public may be barred from a criminal trial in appropriate cases, if it is shown that there is a compelling governmental interest which justifies such closure. (*Globe Newspaper Co. v. Superior Court* (1982) ____ U.S. ____, 102 S.Ct. 2613, 73 L.Ed.2d 248, 257).

Here, the Trial Court found that closure of part of the *voir dire* was justified, given the peculiarly sensitive facts

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[1]Although there was extensive oral argument at the first two hearings (no record appears to have been made of the *ex parte* hearing), the only written opposition to any of the motions were two letters written by Joseph Peter Myers, counsel for the defendant. (J.A. 61-63, 68-70.)

[2]An additional hearing was held on May 17, 1983, when the Attorney General of the State of California representing the People in the appeal in the Supreme Court of California, requested clarification from the Trial Court as to its order sealing the *voir dire* transcripts. The Trial Court ruled, in essence, that the transcript was to remain sealed from the public, but could be utilized in a confidential manner in the appellate process by appellate counsel or anyone else legitimately involved in that process.

of the underlying case, in order to protect and preserve the Sixth Amendment right of the defendant and the prospective jurors' right of privacy. At the conclusion of the trial, the Trial Court accordingly refused to release the transcript of that *voir dire* which had been conducted *in camera*, because it was found that to do so would violate the right of privacy of the jurors and all the other venirepersons who had given their testimony in an atmosphere conducive to the belief that their responses would not be released to the public. Such closure was done in compliance with the three-pronged standard of *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555.

The right of privacy of prospective jurors is a vital concept, particularly in California, in order to ensure fair trials in capital cases and protect the jury system, because of two recent decisions of the Supreme Court of California. In *Hovey v. Superior Court* (1980) 28 Cal.3d 1, it was held that prospective jurors must be questioned individually and out of the presence of other prospective jurors as to the death-qualification issues. And in *People v. Williams* (1981) 29 Cal.3d 392, it was held that counsel are entitled to ask questions of a prospective juror that are reasonably designed to assist in the intelligent exercise of peremptory challenges, whether or not such questions are likely to uncover grounds sufficient to sustain a challenge for cause.

The State has a vital interest in protecting the jurors' right to privacy. Prospective jurors should not be forced to leave their rights at the doorstep of the courthouse; they should not be forced to divulge private matters, information for which the State would otherwise have to demonstrate a compelling interest to invade simply because they are performing their civic duty.

Inherent in this situation is the balancing of the right of the press and public to attend criminal trials and the right

of the defendant to a fair trial and the right of the prospective juror not to have his right of privacy unduly invaded. The essential question here is *not* whether prospective jurors have a right of privacy. Rather, the essential question is whether prospective jurors have a right of privacy which may, in appropriate cases, outweigh the public's right of access to criminal trials and permit the trial court to close to the public jury *voir dire* which invades that right.

Here, the defendant and the People were afforded the widest scope in examining the prospective jurors, which included questions dealing with traditionally personal and sensitive topics such as race, religion, sex and politics. But because of the sequestered nature of the *voir dire*, the jurors were also impliedly assured that their responses to these inquiries would remain confidential. The Trial Court struck a balance between the counter-vailing rights involved, by allowing the parties to inquire into, but by disallowing the publication and dissemination of, the sensitive portions of the *voir dire* and by allowing public access to the remainder of the trial.

ARGUMENT.

I.

The Right of the Public to Attend Criminal Trials Is Not Absolute and May Be Denied in Appropriate Cases.

It is well settled that the press and the public have a First Amendment right to attend criminal trials (*Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555; *Globe Newspaper Co. v. Superior Court* (1982) ___ U.S. ___, 102 S.Ct. 2613, 73 L.Ed.2d 248), and that this right of access extends to the *voir dire* of prospective jurors.[3] (*United States v. Brooklier* (9th Cir. 1982) 685 F.2d 1162.) This right, however, is clearly not absolute. (*Globe Newspaper, supra*, 73 L.Ed.2d at 257.)

Situations can and do arise where a public or personal right must, because of a countervailing public or private right, give way. And, although this Court has recognized that "the circumstances under which the press and public can be barred from a criminal trial are limited" (*Globe Newspaper, supra*, 73 L.Ed.2d at 257), explicit within that statement is the fact that under appropriate circumstances, and in appropriate cases, the right of the press and the public to attend criminal trials may be abridged. Certainly closure may not be arbitrary, nor may it occur simply on the basis of an agreement between the judge and the litigants that closure is preferred. But this Court has consistently indicated

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[3]Counsel for defendant Brown argued at the October 19 hearing that jury *voir dire* was not "part of the trial" and thus there was no First Amendment right of access of the press or public. (J.A. 105, 107.) Authority in California, however, is to the contrary (*People v. Teitelbaum* (1958) 163 Cal.App.2d 184, 206-207) and this theory was not a ground on which the Trial Court exercised its discretion to partially close *voir dire* in this case. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

that a criminal trial may be closed, in whole or in part, at the discretion of the trial judge if closure is justified under the standard set forth in *Richmond Newspapers*. (*Id.*; accord, *Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free-Press — Fair Trial" Issue*, as approved by the Judicial Conference of the United States on September 25, 1980, in 87 F.R.D. 519 (1981).)

Here, the general jury *voir dire*, the trial and the sentencing all were open to the public and the press. Only that part of the jury *voir dire*, which threatened the privacy rights of the prospective jurors was closed. Such closure is consistent with both *Richmond Newspapers* and *Globe Newspaper*, and was, under the circumstances of this particular case, necessary and proper.

II.

The Denial of the Public's Right of Access to the Jury *Voir Dire* in This Case Was Proper Under the Three-Pronged Standard of *Richmond Newspapers*.

In *Richmond Newspapers*, this Court set forth a three-pronged standard which must be met before a court may close all, or any part of a criminal trial:

> First, whether there are findings on the record to support such closure.
>
> Second, whether the trial court considered solutions alternative to the closure of the trial.
>
> Third, whether the trial court recognized the constitutional right of the public and press to attend the trial. (*Id.*, 448 U.S. at 580, 581.)

Although the Newapaper argues that none of the procedures outlined in *Richmond Newspapers* were followed, and that closure was done arbitrarily, a review of the record belies that claim. Indeed, the record reveals that the Trial

Court afforded the parties a full opportunity to speak to the issues raised and that the Trial Court considered and weighed the competing First Amendment rights of the press and the public against the constitutional right of privacy of the jurors and the Sixth Amendment right of the criminal defendant to a fair trial. And it was only after all issues were fully discussed that an order to partially close the jury *voir dire* was made.

First, there are findings in the record to support the partial closure of the *voir dire* and the refusal to release the transcript. (J.A. 72-122.) These pages reflect the arguments of counsel, with which the trial court agreed: that in the interest of affording the defendant a fair trial before a fair and impartial jury, it was first necessary to afford the prospective jurors a measure of privacy during *voir dire*. As the defense counsel noted on December 30:

> And I can think of several of the people interviewed who are now on the jury who were concerned that what they were telling us about themselves was, in fact, confidential.
>
> One woman I certainly recall said, "I couldn't say these things because there's a lady in the venire who knows my mother, and I would never want my mother to know about this situation."
>
> And I'm sure the Court and counsel can recall numerous other incidents where very intimate details were presented. (J.A. 106.)

After these and other comments were made, the judge stated that he agreed with much of what had been said by the attorneys for the People and the defendant. (J.A. 121.) Certainly this comment by the Trial Court in and of itself, incorporating the remarks of the attorneys, more than satisfies the issue of whether there were findings. Courts have long permitted, and in fact endorsed, the incorporation of

statements from other documents, such as in pleadings. Incorporation would serve the same useful purpose here especially since the reason for requesting findings is so that the public, as well as a reviewing court, will know the grounds on which the order was made. Here, there can be no question but that it is the jurors, right to privacy that is the reason that closure was initiated, and that it was the compelled disclosure of sensitive material during the *voir dire* which prompted the Trial Court to refuse to release the transcripts.

In terms of solutions alternative to closure, it is evident that although the Newspaper argues that there were available alternatives to closure, the Newspaper never indicated or even alluded to just what those alternatives were, either in its written motions or during oral argument. The Trial Court did in fact employ an alternative to total closure of the *voir dire*. The Trial Court allowed public access to the general portion of the *voir dire* and only closed that portion of it which concerned the death-qualification and other special areas. Moreover, a transcript of the *voir dire* was made.[4]

Finally, there can be no question that the Trial Court fully recognized the right of the press and the public to attend the *voir dire*. At the first hearing on October 19, the Trial Court referred to the fact that "the public's right to know should be respected and permitted." (J.A. 87.) And at the December 30 hearing, the Trial Court specifically weighed the competing interests of "the public's right to know"

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[4] In a sense, there are probably no alternatives available to closure other than those applied in the instant case when the jurors' right to privacy is at issue. Just as in *Globe Newspaper*, were the judge to release the transcripts to the press or make them generally available to the public, this would cut against the reason for the closure. (*Id.*, 73 L.Ed.2d at 259.)

against "the right to privacy" and "the right to a fair trial."[5] (J.A. 121.) Indeed, the three motions brought before the Trial Court, accompanied as they were by extensive oral argument, could do nothing but heighten the Trial Court's awareness of the right of access of the public and the press and the constitutional provision in which that right is rooted; the fact that the Trial Court determined that it was outweighed by countervailing rights does not indicate that the First Amendment right was not recognized.

III.

The Trial Court Did Not Violate the Public's First Amendment Right of Access to Criminal Trials by Its Application of *Hovey*.

Given the nature of the alleged crime, the Trial Court anticipated a rather lengthy *voir dire*. Although the *voir dire* here lasted only six weeks, it is not unusual for *voir dire* in sensitive capital cases in California to last as long as six months. Considering the large number of prospective jurors who would, or could, be called, it is a reasonable expectation that if the entire *voir dire* had been open to the public, and the press had reported the proceedings, persons not yet even summoned for jury service could have read newspaper accounts of earlier *voir dire* and have been influenced by them. This, in and of itself, would have violated the underlying philosophy of *Hovey v. Superior Court* (1980) 28 Cal.3d 1, which requires that prospective jurors be seques-

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[5]Amici Society of Professional Journalists, *et al.*, claim that the concern for the jurors' right to privacy is an after-the-fact argument that was not articulated until February 23, 1982. (Br. 23.) However, on October 19, both the District Attorney (J.A. 82) and defendant's attorney (J.A. 85-86) spoke of privacy concerns and the Trial Court noted that the closed *voir dire* would be also as to "any other special areas that counsel may feel some problem with regard to, questioning them in the presence of others . . ." (J.A. 93.) See also record of December 30. (J.A. 121.)

tered from other prospective jurors during *voir dire* on the death-qualifying issue.

Hovey reaffirmed and promoted the right of the criminal defendant to a fair trial before a fair and impartial jury, in part, by the sequestration of the jury during *voir dire* on the death-qualification issue. It is premised on the theory (a) that prospective jurors will be more candid in their responses to *voir dire* if they are examined out of the presence of other prospective jurors, and (b) that prospective jurors tend to be influenced by the responses and comments of other prospective jurors, and thus the need to separate the jurors during that phase of the *voir dire*. The Supreme Court of California felt that sequestration was extremely important because "trial courts must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which society has entrusted the ultimate responsibility for life and death." (*Id.*, 28 Cal.3d at 81.)

The considerations expressed in *Hovey* are most appropriate in their application to the underlying criminal trial. Here, because of the nature of the case, and because of *People v. Williams* (1981) 29 Cal.3d 352, the *voir dire* was necessarily far-ranging, and delved into such personal areas as sexual experiences and feelings, and racial, religious and political attitudes, including inquiries even into the secrecy of the ballot box. In view of the potentially large number of prospective jurors who would be called, and the extensive time which would be required to conduct the *voir dire*, it was clearly foreseeable at the outset that individuals not yet summoned to serve on jury duty could, if precautions were not taken, have read the responses and comments of earlier prospective jurors. Because of the peculiarly sensitive nature of this criminal trial, the exposure of persons not yet called could have defeated the rationale of *Hovey*, with resulting

infringement on the defendant's right to a fair trial.

With the above in the record, it is not surprising that the judge concluded on October 19 that closure was necessary to ensure a fair trial, (J.A. 87) and that he concluded on December 30 that:

> I agree with much of what the defense counsel and People's counsel have said and I also, regardless of the public's right to know, I also feel that's rather difficult that by a person performing their civic duty as a prospective juror putting their private information as open to the public which I just think there is certain areas that the right to privacy should prevail and a right of the people to know, I think, should have some limitations. (J.A. 121.)

From a review of the entire record, it is clear that the Trial Court followed the procedural requirements of *Richmond Newspapers* and that closure was thereby justified.

IV.

Prospective Jurors in a Criminal Case Have a Constitutional Right to Privacy Which the State has a Legitimate Interest in Protecting During *Voir Dire*.

In what is perhaps the most influential law review article ever written, "The Right to Privacy". (Warren and Brandeis, 4 *Harvard Law Review* 193 (1890)) the concept that a person had a right to be let alone was set forth.[6] Later, Justice Brandeis expanded on his thoughts in his dissenting opinion in *Olmstead* v. *United States* (1928) 277 U.S. 438 at 478 wherein he wrote "The right to be let alone — the

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[6]Perhaps the first reference to the concept of privacy can be found in *Cooley on Torts* (1888) at page 29 where it is written: "The right of one's person may be said to be a right of complete immunity: to be let alone." (See, *Report of the Commission on Personal Privacy* by the State of California Commission on Personal Privacy (December 1982), p. 23.)

most comprehensive of rights and the most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, by whatever means employed, must be deemed a violation." And just six years ago, this Court noted that "the third [right of privacy] is the right of an individual to be free in action, thought, experience, and belief from government intrusion." (*Whalen v. Roe* (1977) 429 U.S. 589, 869 n. 24; see also *Griswold v. Connecticut* (1965) 381 U.S. 479 and *NAACP v. Alabama* (1958) 357 U.S. 449.)

In California, the right to privacy has been explicitly recognized in Article I, §1 of the California Constitution. And this right to privacy has been recognized to be a right held by prospective jurors. (*Report of the Commission on Personal Privacy, supra*, pp. 288-290; see also *Lehman v. City and County of San Francisco* (1978) 80 Cal.App.3d 309.)

Although this Court had not yet dealt specifically with the concept of the juror's right to privacy, this Court's decisions in *Whalen, supra*, and *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, both of which deal with the question of the existence of a constitutionally protected right to privacy and the right to avoid the compelled disclsoure of private matters, have laid down a foundation for the finding of such a right. (*See*, Comment, "*The Right to Privacy of Prospective Jurors During Voir Dire*, 70 Cal.L.Rev. 708 (1982).)

In *Nixon*, this Court defined the privacy right as a "legitimate expectation of privacy" standard, or rather a two-part test as described in Justice Harlan's concurring opinion in *Katz v. United States* (1967) 389 U.S. 347. The first part of this test requires that the individual must have exhibited an actual expectation of privacy; the second part requires that the expectation must be one which society is

prepared to recognize as "reasonable". (*Id.*, 389 U.S. at 361.)

That the prospective jurors here felt and exhibited an actual expectation of privacy is seen in the March 10, 1982 letter from defendant's counsel, wherein he describes his observations of various jurors following the trial. (J.A. 69.) It can also be seen in the argument of counsel on December 30. (J.A. 106, 107, 110-112.) Certainly the atmosphere in which the *voir dire* was conducted, with the prospective jurors sequestered from everyone but the parties litigant, would be conducive to an expectation of privacy, particularly in the minds of prospective jurors who were not otherwise familiar with the law. Their expectations of privacy were those that this Court has already recognized would be preserved and protected.[7]

Because of the way in which *voir dire* developed, it would be unlikely to find historical precedent for the juror's right to privacy. In England, early juries were as much witnesses as juries since they were already acquainted with the facts. (1 W. Holdsworth *A History of English Law* 317 (3d ed. 1922).) And English juries did not lose their character as witnesses until the latter part of the seventeenth century. (1 Holdsworth, *supra*, at 319.) Moreover, *voir dire* examination has traditionally been limited, being conducted only after a challenge had been made, and such challenges were infrequently made. (Moore, *Voir Dire Examination of Jurors; I. The English Practice*, 1 Geo. L. J. 438, 445 (1928); Levit, *Expediting Voir Dire: An Empirical Study*, 44

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[7]See, e.g., *Griwold v. Connecticut* (1965) 381 U.S. 479 [marital privacy]; *NAACP v. Alabama* (1958) 357 U..S. 449 [associational privacy]; *Roe v. Wade* (1973) 410 U.S. 113, *reh. den.* 410 U.S. 959 [marriage and procreation]; *Deerfield Medical Center v. City of Deerfield Beach* (5th Cir. (Unit B) 1981) 661 F.2d 328 [procreation and abortion].

So.Cal.L.Rev. 916, 922 (1971).) And, since the concept of the right to privacy, although one of the penumbral rights of the Constitution, was first expressed a little under 100 years ago, it is not surprising that it has not been part of *voir dire* history.

But there is a strong history of the protection of prospective jurors by trial judges as to matters which might affect the personal privacy of the jurors.

In *Sprouce v. Commonwealth* (1823) 2 Va.Cas. 375, it was held that a prospective juror had a privilege to refuse to answer any question on *voir dire* which would tend to fix infamy or disgrace upon him. In 1897, a Georgia court held that in no event was the trial court bound to ask, or to permit counsel to ask, a prospective juror any question which would tend to incriminate or disgrace him. (*Ryder v. State* (1897) 100 Ga. 528, 28 S.E. 246, 248.) In *Twining v. State* (1964) 198 A.2d 291, a Maryland court disallowed questions tending to disgrace prospective jurors.

More recently, courts have been willing to protect prospective jurors on the basis of a right to privacy when their physical safety was at stake. In *United States v. Barnes* (2d Cir. 1979) 604 F.2d 121 *cert. den.* 446 U.S. 907, the court withheld the names, addresses and ethnic backgrounds of prospective jurors in a criminal trial because of concerns for their physical safety. And in *United States v. Bufalino* (2d Cir. 1978) 576 F.2d 446 *cert. den.* 439 U.S. 928, *voir dire* was conducted outside the presence of everyone, including counsel, because some of the prospective jurors had complained that there were spectators in the courtroom glaring at them and harassing them.

Thus, it can be seen that trial courts have for years been willing, on a case-by-case basis to limit the exposure of

prospective jurors to the public during *voir dire* when the occasion demanded.[8]

Similarly, the closure of portions of the *voir dire* in the criminal trial here and the sealing of the transcript were necessary in order to serve and satisfy compelling governmental interests. The preservation of the confidentiality of the information that the State could otherwise not force prospective jurors to reveal will help preserve our system of criminal trials before fair and impartial jurors. To deny prospective jurors their right of privacy in situations where they are compelled to disclose intimate and sensitive details of their private lives in a public forum is to place them in a most awkward or perhaps even painful situation. To preserve their privacy they might refuse to answer, thus subjecting themselves to contempt proceedings, or worse, they may simply lie. The *Hovey* decision recognized that at least in the area of death-qualification questions, sequestration from other prospective jurors was necessary to obtain candid responses.

In a case such as this one, where questions about sexual matters, politics, race, religion and the secrecy of the ballot box were thoroughly examined by the parties for the protection of the defendant's Sixth Amendment right, complete and candid responses from prospective jurors were mandatory. Thus, the closure of a portion of the *voir dire* dealing with sensitive issues served to protect the defendant's right

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[8]See, *e.g.*, the *California Judge's Bench Book-Civil Trials*, California Center for Judicial Education and Research (1981), §4.19, p. 100. It recommends that when public disclosure of personal information on *voir dire* could seriously damage a juror, the court should use written questions to be reviewed only by counsel and the court. The article states that the written question "thus protects a juror from unnecessary public disclosure and avoids unnecessary exposure of other jurors to this information. A written question may also encourage a juror to disclose an incident that he or she might otherwise conceal in open court." The same could also be said of side-bar conferences which are private and frequently not reported.

as well as to preserve the jurors' right. As *Barnes* noted:

> If Darrowesque questioning of prospective jurors were allowed, namely "religion, politics, social standing, family ties, friends, habits of life and thought", any semblance of juror privacy would have to be sacrificed.

(*Barnes, supra*, 604 F.2d at 143.)

It must also be considered that a prospective juror assigned to serve in a criminal trial encompassing death penalty potential and other highly sensitive issues and another prospective juror assigned to serve in a criminal trial involving a less serious crime and where the *voir dire* will be appreciably less intrusive into the jurors' zones of privacy, creates a legal lottery system in which the private lives of certain jurors are exposed to public scrutiny while other jurors escape such exposure. Jurors should have a standard by which the extent of questions which they may be required to answer in public can be measured, and it should not depend solely on the type of criminal case for which they are summoned. While general questions may be asked, specific questions as to specific feelings and experiences in areas of expected privacy should not be made public. Otherwise, the fundamental right which is sought to be protected, a fair trial for the accused, will be violated.

V.

The Sealing of the Transcript Was Necessary to Preserve and Protect the Privacy Right of All the Jurors.

To close any portion of a criminal trial in order to protect the privacy right of prospective jurors, encourage candor, and thereby ensure the defendant a fair trial, and then later, at a time when the defendant's right to a fair trial is no longer paramount, to release the transcripts of the closed proceedings could, in individual cases, work a substantial hardship on the jury system.

The Newspaper argues that the closure of portions of criminal trials and the non-release of the transcripts will inevitably disturb and erode the public's confidence in our scheme of criminal justice. Yet, a greater potential for erosion of that scheme exists if the transcripts are compelled to be released. It could be potentially more disturbing and work a greater hardship on the jury system if prospective jurors gave testimony about their most intimate and personal lives with the belief that their responses were being held in confidence, and then later discovered that feelings and experiences they would never have otherwise revealed had been exposed because the transcripts were made public.

People v. Williams (1981) 29 Cal.3d 392 allows counsel to ask wide-ranging and deeply-probing questions about very private aspects of peoples' lives. Compelled responses could be embarrassing and could bring disgrace upon the prospective jurors if they became publicly known. Yet, in a practical sense, there is no procedure by which a prospective juror can protect his right to privacy unless that power is reserved to the trial judge.

Simply stated, there is no one in the trial court, except the judge, who is in a position to protect the privacy rights of the prospective jurors. Indeed, while supervising the conduct of the criminal trial in order to ensure a fair trial for the accused, the trial judge also assumes the responsibility, in effect, of acting as legal counsel for all the prospective jurors. And, once the criminal case is concluded, involving very sensitive issues on jury *voir dire*, and the trial court is no longer rquired to protect the defendant's rights to a fair trial, the judge must nonetheless fulfill his obligation to the prospective jurors. The judge must protect the right to privacy of the jurors and thereby perpetuate the even-handed image of government which is inherent in a free society. The refusal of a judge to protect this privacy right could

have a serious effect of deterring citizens from approaching jury service with candor, responsibility and respect for the judicial system. Ultimately, this could destroy the rights of defendants to fair trials.

The sealing and non-release of the transcripts is compelled here because if the benefit sought to be obtained by closure is protection of the privacy right of the jurors, such benefit would be illusory if transcripts of the proceedings were later released to the public. When this Court confronted the question of an automatic closure provision in criminal sex-offense trials during the testimony of minor victims, the Court noted that the Massachusetts rule nonetheless allowed the press access to the transcript of such testimony, and recognized that there were as well other possible sources of accounts of the testimony such as the court personnel.

> Thus, §16A cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity. If the Commonwealth's interest in encouraging minor victims to come forward depends on keeping such matters secret, §16A hardly advances that interest in an effective manner. (*Globe Newspaper, supra*, 73 L.Ed.2d at 259.)

Similarly, in the criminal trial in the instant case, the release of the transcripts of the *voir dire* would effectively vitiate the closure and the protection that was afforded the prospective jurors.

This is not to suggest that the sealing and non-release of the transcript is the only alternative if the *voir dire* is itself closed. Rather, it is the recognition that in appropriate cases, when the area of privacy has been invaded upon the reasonable expectation that the responses would remain confidential, and items within the boundaries of this expectation have been the subject of questioning, that the non-release of the transcripts is appropriate. Here, specific references

to incidents in the record were made by the attorneys (see, *e.g.*, J.A. 106 (defense attorney Myers) and 111 (Deputy District Attorney Spitzer) at the December 30 hearing. In the order of February 23, the trial judge stated that "some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discussion." (J.A. 39.) Under the circumstances in this case, the order not to release the transcripts was thus necessary and appropriate.

Finally, it should be remembered that the public is not prohibited from obtaining the information it seeks from the prospective jurors themselves. Once the trial was concluded, the Newspaper could have contacted any of the jurors or prospective jurors who had been summoned. At that time, the holders of the privacy right could have, if each individual had so chosen, revealed any and all information as to what occurred during *voir dire* and what information each individual might have disclosed.

Conclusion.

To be sure, the governmental interest argued here is not compelling with reference to every trial, nor to every criminal trial. But it clearly gathers strength, reaching a level which is patently definable as "compelling" when the criminal trial embraces a set of circumstances which make it foreseeable that prospective jurors will themselves be compelled to disclose information which, if publicly disseminated, could cause hardship, embarrassment and disgrace to individuals who had no choice and were allowed no opportunity to challenge or otherwise prevent such disclosure.

The Newspaper holds itself out in this case not only as a journalistic entity but as a representative of the *public*. The Trial Court in this case is an arm of the criminal justice

system, and responsible to that same *public*. Those who were summoned for jury service in this case to fulfill their civic obligations are the same *public* who are served by both the Newspaper and the Trial Court, and to whom both the Newspaper and the Trial Court are responsible. That responsibility includes being *responsive* to the constitutionally based right of privacy of the *public*.

We do not speak here of the isolated case wherein a private individual is involuntarily catapulted into the public eye by the serendipity of having witnessed or been a party to a newsworthy event. Rather, this case speaks to all of those men and women who are called each year for jury service, and who faithfully respond to that summons.

The paramount question presented is whether those men and women lose their constitutional right to privacy when they are summoned by their government to serve as jurors. The traditional faith of the people of the United States of America in our system of government precludes an affirmative response. Instead, recognition of the jurors' right to privacy produces a fine balance which is responsive to the criminal justice system, the press and the whole of the public. It also allows a trial court on a case-by-case basis to close jury *voir dire* and, where necessary, seal the transcript in accordance with the constitutional safeguards set forth in *Richmond Newspapers* and *Globe Newspaper*. In this way, and to the maximum extent possible, all rights involved are harmonized and preserved.

For the foregoing reasons, the orders of Respondent Court closing the *voir dire* and sealing the transcript should be affirmed.

Respectfully submitted,

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